

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**ROBERT DAVIS**

**PLAINTIFF**

**vs.**

**NO.: 4-07-CV-00521-BSM**

**UNION PACIFIC RAILROAD COMPANY**

**DEFENDANT**

**UNION PACIFIC'S REPLY TO PLAINTIFF'S SUPPLEMENTAL RESPONSE TO  
UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed a supplemental response to UP's Motion for Summary Judgment. He argues that the 2007 amendment to the Federal Railway Safety Act removes preemption/preclusion defenses whenever a railroad violates its own rule. He further argues that UP is barred from asserting a preclusion defense because UP had ballast in place that was larger than its internal guidelines for yard ballast. UP, however, did not adopt its ballast guidelines in response to a federal law or regulation. As a result, the exception to preemption/preclusion is not applicable, and Plaintiff's case should be dismissed.

UP addressed this issue in detail under section I of its Reply Brief (Docket No. 51) and accordingly adopts it by reference. In short, Section 20106(b)(1)(B) created an exception to preemption/preclusion defenses whenever a railroad fails to comply with its own plan, rule or standard that is required by a federal regulation or order. On the other hand, if there is no federal regulation or order requiring a railroad to formulate and implement a plan, rule or standard, the exemption to preemption/preclusion defense does not apply. *See, e.g., Murrell v. Union Pacific R.R. Co.*, 544 F. Supp. 2d 1138 (D. Or. 2008) (stating that the exception to preemption was not applicable even though the railroad failed to comply with speed limits set in its timetables because the railroad's "maximum timetable speed limits were internal rules that were not 'created pursuant to a [federal regulation] or order issued by the Secretaries.'") (quoting

§ 20106(b)(1)(B)); *Van Buren v. Burlington N. Santa Fe Ry. Co.*, 544 F. Supp.2d 867, 879 (D. Neb. 2008) (finding that the new preemption exception to the FRSA did not apply because the railroad's vegetation rules were not created pursuant to the requirements of any federal regulation). If having the internal rule, guideline or plan is not required by a federal regulation or order, section 20106(b)(1)(B) "does not subject parties to tort liability for failure to comply with those plans." 74 Fed. Reg. 1791-92 (attached in pertinent part as Exhibit 1); *Murrell*, 544 F. Supp. 2d at 1150. UP's ballast guidelines were not adopted in response to a requirement imposed by a federal law or regulation; therefore, its preclusion defense does not fall within the exception to 49 U.S.C. § 20106(b)(1)(B). Accordingly, UP has asserted a valid preclusion defense, and Plaintiff's Complaint should be dismissed.

Respectfully submitted,

SCOTT H. TUCKER, #87176  
KRISTOPHER B. KNOX, #2004071  
FRIDAY, ELDREDGE & CLARK  
400 W. Capitol Avenue, Suite 2000  
Little Rock, Arkansas 72201  
Telephone: (501) 376-2011  
Fax: (501) 376-2147  
tucker@fec.net  
kknox@fec.net

*Attorneys for Union Pacific Union  
Pacific Railroad Company*

/s/ Kristopher B. Knox  
KRISTOPHER B. KNOX, #2004071

**CERTIFICATE OF SERVICE**

I, Kristopher B. Knox, do hereby certify that on this 4th day of February, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

Nelson G. Wolff  
Roger Denton  
Andrew S. Williams  
Julia M. Eades  
Schlichter, Bogard & Denton  
100 South 4<sup>th</sup> Street, Suite 900  
St. Louis, MO 63102

Edward T. Oglesby  
Oglesby Law Firm, P.A.  
100 Morgan Keegan Drive, Suite 110  
Little Rock, AR 72202

/s/ Kristopher B. Knox  
KRISTOPHER B. KNOX, #2004071  
FRIDAY, ELDREDGE & CLARK  
400 W. Capitol Avenue, Suite 2000  
Little Rock, Arkansas 72201  
Telephone: (501) 376-2011  
Fax: (501) 376-2147  
kknox@fec.net